UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 84

Docket No. SF-0752-12-0553-I-1

Jerry J. Edwards,

Appellant,

v.

Department of the Air Force,

Agency.

October 30, 2013

Jerry J. Edwards, Panama City, Florida, pro se.

Kyle Rodgers, Joint Base Andrews, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons that follow, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant was appointed to the position of Supervisory Bowling Facility Manager at the Yokota Air Base in Japan effective April 15, 2007. Initial Appeal File (IAF), Tab 7 at 43. The appellant was initially appointed to his position for 3

years, which was subsequently extended for another 2 years, up to the maximum amount of time allowed by the Department of Defense policy governing overseas employment. *Id*. at 39, 46. On March 2, 2012, the agency issued the appellant notice that it was placing him on administrative leave pending an investigation into his conduct and informed him that his term would expire on April 14, 2012. *Id*. at 41. The agency issued the appellant a notice of proposed termination on March 6, 2012, *id.* at 33-34, and, after giving him a period of time to respond, issued him a notice of termination, *id*. at 21-22.

¶3 The appellant filed an initial appeal challenging his termination under chapter 75 and raising a claim of whistleblower reprisal. IAF, Tab 1. The administrative judge outlined the jurisdictional burdens for both chapter 75 appeals and individual right of action (IRA) appeals, *see* IAF, Tabs 16 and 17, and, on September 20, 2012, the administrative judge dismissed the appellant's chapter 75 appeal without a hearing on the ground that the expiration of his term appointment was not an adverse action appealable to the Board. IAF, Tab 24, Initial Decision (ID) at 4-5.[1] Relying on *Scott v. Department of the Air Force*, 113 M.S.P.R. 434 (2010), the administrative judge found that the totality of the circumstances evidenced that the appellant held a term appointment at the time of his separation. ID at 4. In reaching this conclusion, the administrative judge found the appellant's Standard Form (SF)-50, which indicated that the appellant was appointed to a career-conditional appointment in the competitive service, was not controlling and that his specific employment agreement showed that he was appointed to a term position. *Id*. at 4-5. The administrative judge further held that the agency's decision not to place the appellant in its Priority Placement Program (PPP), which is designed to place employees in comparable positions of

[1] Because the administrative judge dismissed the appellant's appeal for lack of jurisdiction, she did not reach the issue of whether the appellant's initial appeal was timely. ID at 1 n.1

employment within the agency, IAF, Tab 7 at 35-39, was not an otherwise appealable action to the Board. ID at 5 (citing *Scott*, 113 M.S.P.R. 434, ¶ 10).

¶4 The administrative judge also found that the Board lacked jurisdiction over the appellant's whistleblower reprisal claim as an IRA appeal because the appellant failed to exhaust his administrative remedies with the Office of Special Counsel (OSC). *Id.* at 6. The record reflects that the appellant submitted a complaint of whistleblower reprisal to OSC, that OSC issued the appellant a closure letter informing him that it was "clos[ing] our inquiry into your allegation based upon a lack of jurisdiction," and that, shortly thereafter, the appellant submitted a reconsideration request to OSC asking it to reconsider its determination that it did not have jurisdiction over his complaint as a nonappropriated fund employee. *See* IAF, Tab 14 at 2; Tab 15 at 2-3. The administrative judge noted that "OSC has not yet reopened [the appellant's] complaint or issued a close out letter notifying him of his right to seek corrective action with the Board," and she found that the appellant had therefore not met the exhaustion requirement. ID at 6.

¶5 The appellant has filed a petition for review asking that the initial decision be reviewed. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

The appellant has presented nonfrivolous allegations of Board jurisdiction over his termination entitling him to a jurisdictional hearing.

¶6 An appellant is entitled to a jurisdictional hearing if he raises nonfrivolous allegations of Board jurisdiction over his appeal. *Levy v. Department of Labor*, 118 M.S.P.R. 619, ¶ 5 (2012). In determining whether an appellant has made nonfrivolous allegations of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual

contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Id.*

¶7 The expiration of a term appointment is not an adverse action appealable to the Board in a chapter 75 appeal. *Endermuhle v. Department of the Treasury*, 89 M.S.P.R. 495, ¶ 9 (2001); 5 C.F.R. § 752.401(b)(11). The exact date of an appointment's expiration need not be predetermined in order for the expiration of the appointment to be outside of the Board's adverse action jurisdiction. *Endermuhle*, 89 M.S.P.R. 495, ¶ 9. The Board looks to the totality of the circumstances to determine the nature of an employee's appointment; an employee's SF-50, although the customary document used to memorialize a personnel action, is not controlling. *Scott*, 113 M.S.P.R. 434, ¶ 8. Whether an employee meets the definition of employee under 5 U.S.C. § 7511 is irrelevant to whether an employee can appeal the expiration of a term position. *Scott*, 113 M.S.P.R. 434, ¶ 9.

¶8 The administrative judge relied upon the Board's decision in *Scott* as controlling precedent in support of her jurisdictional dismissal. ID at 3-5. In *Scott*, the Board held that it lacked jurisdiction over an employee's appeal challenging the expiration of the employee's appointment to an overseas position for a term of 36 months, at the end of which he was separated from employment. 113 M.S.P.R. 434, ¶¶ 6-7. The Board found that, notwithstanding the employee's SF-50, which reflected that he had been appointed to a career-conditional competitive service position, the totality of the circumstances reflected that the employee received a term appointment based upon the conditions outlined in the Department of Defense (DoD) Transportation Agreement and its Overseas Employment Agreement, both of which the employee signed upon his initial appointment. *Id.*, ¶ 6. In finding that the employee was appointed to a term position, the Board explained that the DoD Transportation Agreement stipulated

that it was an initial agreement and that the employee was a new employee; that "his 'prescribed tour of duty' was 36 months"; that he was "eligible for return travel and transportation allowances to his actual residence at the time of his appointment 'for purposes of separation from the service'"; and that the employee's Overseas Employment Agreement specified that he could be separated from the agency if he was unable to find another position at his same level, or one grade lower, upon his return to the United States. *Id*. Importantly, the Board noted that the employee in *Scott* "agreed that he did 'not have return rights back to a position in the United States,' and that to continue employment in the civil service, he could apply for positions after his tour expired." *Id*.

¶9 Relying upon *Scott*, the administrative judge held that the instant appellant was appointed to a term position when he entered into an Overseas Employment Agreement which limited his "allowable foreign service" to no more than 5 years and required him to comply with DoD's procedures for priority return placement upon the end of his term. ID at 4-5; IAF, Tab 7 at 46-47. However, we find that there are several important distinctions between *Scott* and the instant case. First, unlike the employee in *Scott*, the appellant here alleged that he was previously employed by the agency as the Assistant Bowling Facility Manager for the 4-year period immediately prior to his appointment as the Supervisory Bowling Facility Manager. *See* IAF, Tab 19.[2] Second, the Overseas Employment Agreement signed by the appellant does not expressly prescribe a limited tour of duty; rather, the agreement only provides that the appellant's "period of allowable foreign service" will terminate in April of 2010, unless extended (which it was for a period of 2 years). IAF, Tab 7 at 46; *see id*. at 33, 39. Moreover, unlike the DoD

[2] The appellant's hiring documentation prior to his appointment to the Supervisory Bowling Facility Manager position is not included in the appeal file. Although this documentation would have no direct bearing on the nature of the appellant's subsequent appointment, we believe it is germane to the appellant's employment status with the agency and may shed light on the nature of the appellant's rights upon the end of his appointment to the Supervisory Bowling Facility Manager position.

agreements signed by the employee in *Scott*, the appellant's Overseas Employment Agreement does not specify that the appellant could be separated from employment if he is unable to find a comparable position of employment through the agency's PPP upon his return to the United States; the appellant's Overseas Employment Agreement only requires that the appellant "accept the position offered which will fulfill my obligation to return from the foreign service area" and that his "PPP registration [would be expanded] to include all DoD activities in CONUS [Continental United States] if not placed during the initial 6 month registration period." *Id*. at 46. The only provision in the appellant's Overseas Employment Agreement concerning his involuntary separation involves his "failure to request and accept return assignment as I have agreed to do under the terms of this agreement." *Id*. The agency, however, determined that the appellant was ineligible to participate in its PPP because of his "performance or conduct that directly and negatively affect[ed] [his] qualifications, eligibility or suitability for placement," *id*. at 33; it is undisputed that the appellant's separation was not based on any failure to request and accept return assignment in accordance with his Overseas Employment Agreement.

¶10 We further find that the agency's appeal file includes additional evidence in support of a prima facie showing that the appellant was not serving a term position at the time of his separation. The appellant's Overseas Employment Agreement specifies that it "must be signed by an employee or applicant appointed locally or converted in a foreign area *to a career or career-conditional appointment* who is not eligible to sign a transportation agreement." *Id*. at 46. (emphasis added). The appellant's SF-50, moreover, corroborates that the appellant was appointed to a permanent full-time career appointment in April 2007. *Id*. at 43-44.[3] The appellant's Overseas Employment Agreement also

[3] We note, however, that the appellant's SF-50 also states that the appellant is "not entitled to return rights." IAF, Tab 7 at 43. This is a contradiction that should be explored by the administrative judge on remand.

explains that the appellant is eligible to participate in the agency's PPP. *Id*. at 46. The PPP information included in the agency's appeal file, however, suggests that "employees on temporary or term appointments . . . and overseas limited appointments" are generally ineligible to register for the agency's PPP. *Id*. at 36. Moreover, the appellant maintained below that he was a career employee; that a limited overseas assignment is different than a term position; and that term positions are limited to 4 years under 5 C.F.R. § 316.301(a). *E.g.*, IAF, Tabs 18, 22, 23. Neither the administrative judge nor the agency addressed any of these inconsistencies, which preclude a jurisdictional dismissal without a hearing. *See Levy*, 118 M.S.P.R. 619, ¶ 5 ("the administrative judge may not weigh evidence and resolve conflicting assertions of the parties" as to jurisdiction without a hearing).

¶11 In consideration of the totality of the circumstances, we find that the appellant nonfrivolously alleged that he was not serving in a term position at the time of his separation from employment. Accordingly, the appellant is entitled to a jurisdictional hearing on his claim that his termination is an adverse action appealable to the Board under chapter 75. *Id*.

On remand, the administrative judge must first determine whether to consider the appeal under chapter 75 or as an IRA appeal.

¶12 Pursuant to the 1994 amendments to the Whistleblower Protection Act (WPA), an employee who has been subjected to an action appealable to the Board and who alleges that he has been affected by a prohibited personnel practice other than a claim of discrimination under 5 U.S.C. § 2302(b)(1) may elect to pursue a remedy through one, and only one, of the following remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed pursuant to the provisions of the negotiated grievance procedure; or (3) a complaint following the procedures for seeking corrective action from OSC under 5 U.S.C. §§ 1211-1222. *See* 5 U.S.C. § 7121(g); *Agoranos v. Department of Justice*, 119 M.S.P.R. 498,

¶ 14 (2013). Whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums. *Agoranos*, 119 M.S.P.R. 498, ¶ 14. However, an employee's election of remedies under section 7121(g) will not be binding upon the employee if it is not knowing and informed. *Id.* When an agency takes an action without informing the appellant of his procedural options under section 7121(g) and the preclusive effect of electing one of those options, any subsequent election by the appellant is not binding. *Id.*, ¶ 17.

¶13 The record does not reflect whether the appellant filed his whistleblower complaint with OSC before filing his initial Board appeal. However, even if the appellant's OSC complaint was filed before his Board appeal, we find that his election was not knowing and informed because the agency's separation notice did not inform him of his procedural options under section 7121(g) or the possible preclusive effect of filing an OSC complaint. *See* IAF, Tab 7 at 21-22 (letter of decision). Thus, if the administrative judge determines on remand that the Board has jurisdiction over the appellant's separation under chapter 75 and that the appellant's chapter 75 appeal was timely filed or that good cause exists for any filing delay, the administrative judge should then provide the appellant the option of having his appeal adjudicated as a removal under chapter 75, treating his claim of whistleblower reprisal as an affirmative defense. If, however, the administrative judge concludes that the Board lacks jurisdiction over the appellant's separation, or that his appeal was untimely filed without good cause shown, the administrative judge should then determine whether the appellant has established jurisdiction over his appeal as an IRA appeal.

To the extent that his appeal is adjudicated as an IRA appeal, the appellant has established that he satisfied the exhaustion requirement.

¶14 The administrative judge also dismissed the appellant's IRA appeal for lack of jurisdiction, holding that the appellant failed to exhaust his whistleblower

reprisal claim with OSC based upon a request for reconsideration he submitted to OSC. ID at 5-6; IAF, Tab 15 at 2 (appellant's emailed request for reconsideration). Noting that "OSC has not yet reopened his complaint or issued a close out letter notifying him of his right to seek corrective action with the Board," the administrative judge held that the appellant failed to exhaust his administrative remedies with OSC. ID at 6. For the reasons that follow, we find that the appellant satisfied the exhaustion requirement.

¶15 An employee seeking corrective action for whistleblower reprisal under 5 U.S.C. § 1221 is required to seek corrective action from OSC before seeking corrective action from the Board. *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 5 (2012). To satisfy the OSC exhaustion requirement, the appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Id.* In order to properly exhaust his administrative remedies before OSC, "the appellant must show either: (a) OSC has notified him 'that an investigation concerning him . . . has been terminated' and 'no more than 60 days have elapsed since notification was provided' to him; or (b) 120 days have elapsed since the appellant sought corrective action from OSC, and he 'has not been notified by OSC that it shall seek correction action on his behalf.'" *Wells v. Department of Homeland Security*, 102 M.S.P.R. 36, ¶ 6 (2006) (quoting 5 U.S.C. § 1214(a)(3)). The Board has not addressed whether an appellant must exhaust a request for reconsideration submitted to OSC before filing an IRA appeal. Upon consideration of this issue, we find that the appellant's reconsideration request to OSC did not require a second period of administrative exhaustion before filing his IRA appeal with the Board.

¶16 In *Morrison v. Department of the Army*, 77 M.S.P.R. 655 (1998), the Board held that the appellant filed a timely IRA appeal 120 days after receiving a letter from OSC informing her that it was reopening her case file in response to her request for reconsideration. *Id.* at 660-61. The Board reasoned that OSC's

reopening decision—which was issued during the original 60-day period the appellant had to file her IRA appeal after she received OSC's initial close out letter, *id*. at 659—deprived OSC's initial close out determination of the requisite finality needed before the appellant could file her IRA appeal with the Board, *id*. at 660. In so holding, the Board noted two important factors which are germane to the exhaustion issue in the present appeal. First, the Board acknowledged that the appellant justifiably delayed filing her IRA appeal based upon the affirmative act "of the very agency [OSC] whose actions by law determine her right to file an IRA appeal," and that she "did not rely on speculation that her request alone prevented the investigation from having been 'terminated.'" *Id*. Second, the Board opined that "the appellant's request for reopening alone, no matter how quickly submitted, would not have affected her filing deadline. Thus, she would have acted at her peril if she had ignored OSC's original notice and it had not timely reopened her complaint." *Id*. at 659 n.4. Together, these observations support the conclusion that an appellant who seeks reconsideration from OSC after receiving an initial close out letter and does not file an IRA appeal within 65 days of his receipt of OSC's initial determination runs the risk of having his IRA appeal dismissed as untimely if he waits an additional 120 days after submitting his request for reconsideration to OSC. *See id*. ("Prudence would have dictated that the appellant should, nonetheless, have filed with the Board as initially directed.").

¶17 Although the administrative judge noted that "[i]t appears that OSC has not yet reopened his complaint" in response to the appellant's request for reconsideration, ID at 6, we find the administrative judge's affirmative requirement that the appellant *must* wait for a response from OSC—or if he does not receive a response, at least 120 days—before filing his IRA appeal runs counter to our observation in *Morrison* that a request for reconsideration to OSC, alone, does not extend the time to file an IRA appeal with the Board. *See Morrison*, 77 M.S.P.R. 655, 659 n.4. Thus, absent any evidence that OSC

granted the appellant's request for reconsideration or gave the appellant reason to believe that it was reconsidering its prior determination, we conclude that the appellant properly exhausted his administrative remedies by initially presenting his whistleblower complaint to OSC and that he did not have to wait for a response from OSC on his reconsideration request before filing his IRA appeal with the Board.[4] As contemplated by the Board in *Morrison*, merely filing a request for reconsideration at OSC does not create an additional administrative exhaustion requirement. *Id*.

¶18 Because we find that the appellant has exhausted his administrative remedies with OSC, to the extent the administrative judge dismisses the appellant's chapter 75 appeal as untimely or outside the Board's jurisdiction, she should determine on remand whether the appellant has established the remaining jurisdictional elements of his IRA appeal. Specifically, in order to maintain an IRA appeal before the Board, an appellant who has established exhaustion before OSC must nonfrivolously allege that (1) he engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 8 (2011). To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action. *Id*. Whether an allegation is nonfrivolous is determined on the basis of the written record. *Id*. If the appellant satisfies each of these jurisdictional requirements, he has the right to a hearing on the merits of his whistleblower reprisal claim. *Id*.

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[4] The record reflects that the appellant filed his IRA appeal with the Board before receiving OSC's initial close out determination. *Compare* IAF, Tab 1 (initial appeal dated May 26, 2012), *with* IAF, Tab 15 (OSC closure letter dated June 19, 2012). The Board has held, however, that it will adjudicate an appeal that was premature when filed but becomes ripe while pending with the Board. *See Jundt v. Department of Veterans Affairs*, 113 M.S.P.R. 688, ¶ 7 (2010).

ORDER

¶19 Accordingly, we VACATE the initial decision and REMAND the appeal to the administrative judge for further adjudication regarding the nature of the appellant's appointment and termination and, if necessary, the remaining jurisdictional elements of the appellant's IRA appeal.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board